the applicants and paid out to employees on a points or share system do not represent monies of which the applicants are mere trustees or collecting agents for their employees — they are monies which, though described by Mr. Ruosch as solicited gratuities, are clearly monies demanded from clients — at least in the case of one hotel — on pain of eviction if they refused to pay. They accrue to hotel revenue in the first instance and the hotel decides — in the absence of industrial arbitration — how the amount collected should be distributed to its employees. To put it bluntly, it seems as clear as daylight that these so-called "voluntary" tips "solicited" as gratuities for employees are utilised to augment the wages paid to these employees under some colourable and more honorific title such as service charge distribution or take-home "package" when — to call a spade a spade —these payments are, in substance and in fact, part of the remuneration in money due to the employee in respect of his employment falling squarely within the meaning of "wages" as defined in section 2 of the Central Provident Fund Act.

The answers to the three questions in the originating summons are all in the affirmative.

Costs to the respondent.

Questions answered in the affirmative.

Solicitors: *Allen & Gledhill; Rodyk & Davidson.*

COMPTROLLER OF INCOME TAX v. S. & CO. (PTE.) LTD.

[C.A. (Wee Chong Jin C.J., Chua & Tan Ah Tah JJ.)

November 24, 1972]

[Singapore — Civil Appeal No. 31 of 1971]

Income Tax — Assessments based on known income — Set off of alleged losses not allowed — Failure to submit accounts for relevant years — Whether comptroller entitled to raise assessments based on known income without taking into account losses — Income Tax Ordinance (Cap. 166, 1955 Ed. Reprint 16 of 1966), s. 72.

This was an appeal against the comptroller's estimated assessments raised under section 72(3) of the Income Tax Ordinance on the taxpayer company for the years of assessment 1964 to 1968. The assessments were based on the known income of the company from some of the sources only and the comptroller had not allowed any set-off in respect of alleged losses by the company from its trading sources although these sources were known to exist for the relevant years. The comptroller claimed that as no accounts were submitted to him for the relevant years he was entitled to raise the assessments based on known income without attributing losses in respect of other sources in respect of which no accounts were submitted.

At the adjourned hearing before the Income Tax Board of Review the taxpayer did produce some accounts for the year of assessment 1964 only, but this the board found to be unreliable and inaccurate.

Held (by the board): in view of the facts in the case, the comptroller's assessments were correctly raised under section 72(3) of the Ordinance and the defendant had not discharged the onus upon them of proving that the assessments were excessive.

An appeal against the board's decision was heard by Kulasekeram J. and the only substantive point argued was whether in raising the estimated assessments in this case under section 72(3) the comptroller had exercised his best judgment since he had not taken into account the trading source of the appellant company.

Held (by the High Court) allowing the company's appeal: since the comptroller's representative had stated that only known sources of income were taken into account in raising the assessments, without assessing the taxpayer on his other sources, it was not the proper exercise of his best judgment as was required by section 72(3) and hence the assessments ought to be set aside with liberty to the comptroller "to raise fresh assessments in respect of the five years in question within the period of limitation".

The comptroller appealed against the decision of the High Court to the Court of Appeal.

Held (by the Court of Appeal) allowing the appeal: in order for a taxpayer to discharge the onus on him of proving that an estimated assessment is excessive he must not only be able to show that the comptroller has ignored certain sources. There is the further onus to show in what way it is excessive, and applying the *dicta* of Mr. Justice Buttrose in *A.B.C.* v. *Comptroller of Income Tax*[1] by what amount such assessment is excessive.

Dicta in *A.B.C.* v. *Comptroller of Income Tax*[1] followed.

Case referred to:-

(1) *A.B.C.* v. *The Comptroller of Income Tax* [1959] M.L.J. 162 at p. 166.

COURT OF APPEAL.

Amarjit Singh Verick for the taxpayer.

Sat Pal Khattar for the Comptroller of Income Tax.

[Before the Income Tax Board of Review, *Amarjit Singh Verick* appeared for the taxpayer and *Sat Pal Khattar* (*Cheah Cheng Hoc* with him) for the comptroller. On April 18, 1970 the following decision was delivered:]

Sinnathuray, Chairman: This appeal concerns the tax liability or otherwise of the appellant, a private limited company, for 5 years of assessment, namely, the years of assessment 1964 to 1968. The facts of the appeal are not very complicated and the issues of law reasonably straightforward that I can dispose of the appeal with the following oral grounds of decision.

The facts of the appeal are that on 22nd of August 1964, the Comptroller of Income Tax sent a notice to the appellant requesting it to furnish a copy of the accounts for the year ending 31st of December 1963, within 35 days from the date of service of the notice. On 26th of September 1964, Messrs. V. P. Kumaran & Co., the firm of accountants who acted as agents for the appellant, wrote to the comptroller stating that due to a strike that took place on 3rd of September 1963, and a fire on 13th of March 1964 that partly damaged the building where the appellant carried on its business and destroyed the goods and certain other things, the appellant was finding it difficult to finalise the accounts for the said year. They asked for some time to submit the accounts. On 2nd of October 1964, the comptroller again wrote to the agents for the appellant pointing out that accounts had not yet been submitted and that the comptroller was not satisfied that the delay in submitting the accounts was due to the strike and fire. It is not irrevelant to mention here

that as late as 2nd of October 1964 even the accounts for the year ending 31st of December 1962 had not been submitted. There the matter rested in 1964.

On 6th July 1965, the comptroller referred to the earlier correspondence and pointed out that accounts had not yet been furnished for the year ending 31st of December 1962 and for the year ending 31st of December 1963. In answer, on 27th of July 1965, the agents for the appellant wrote that as regards 1963 audited accounts, 3 months' time from 15th of August, 1965 would be required to complete the final accounts and audit and that the said accounts will be available for submission on or before 15th of November 1965. No accounts were submitted in 1965 or 1966.

On 18th of February 1967 the comptroller gave notice to the managing director, A.W.1, that audited accounts for the year ending 31st of December 1963 to 31st of December 1966 had not yet been submitted and drew his attention to the penal provisions in the Income Tax Ordinance. Nothing happened. On the 3rd of July 1968 the comptroller wrote to the managing director. The relevant portion of paragraph 2 of the letter reads: "As the required accounts have not been submitted to date, I have no alternative but to raise estimated assessments on the company as per notices of assessments for the years of assessment 1964, 1965, 1966 and 1967 based on information available." It is as a result of these notices that the appellant filed the petition of appeal to this board.

The appeal was originally set down for hearing on 25th of March 1969. On that day, counsel for the appellant addressed the court on two points, namely, that he had recently been instructed in the matter and that he had advised his client to submit properly audited accounts. He requested for an adjournment. It is, therefore, clear that as late as March 1969 the appellant had no properly audited accounts for the year ending 31st of December 1963, or for that matter, any of the subsequent years. An adjournment was granted to enable the appellant to submit audited accounts direct to the comptroller by 31st of October 1969. This, as the evidence shows, was not done. In fact, audited accounts, A.2, were not signed till 7th of April 1970, last Tuesday, one day after the present hearing. We have the evidence of Mr. McComarck, A.W.3, whose evidence I shall refer to later, that Messrs. Cooper Brothers who had acted as auditors for the appellant for several years were only consulted as regards the 1963 accounts on 3rd of March 1969. It is his evidence that his draft report was ready and had been seen by the managing director of the appellant, A.W.1, on 19th of November 1969. Yet, it was not till 6th of April 1970 that the managing director signed the directors' report, and the auditors, their report, on 7th of April 1970.

I have dealt at length, on the non-submission of properly audited accounts, to show that one cannot say that the comptroller had been unreasonable in raising assessments against the appellant, on 3rd of July 1968, under section 72(3) of the Income Tax Ordinance. This section provides as follows: —

"Where a person has not delivered a return and the comptroller is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, determine the amount of the chargeable income of such person and make an assessment accordingly, but such assessment shall not affect any liability or otherwise incurred by such person by reason of his failure or neglect to deliver a return."

If a taxpayer chooses for reasons best known to himself not to submit returns and accounts, then the taxpayer has only himself to blame if the comptroller elects to act under section 72(3) of the Ordinance.

Now that the comptroller has raised the assessments, the appellant has, of course, the right of appeal to the Board of Review, and, the board has to consider whether the assessments are unreasonable or excessive. What test should the board apply? In other words, what is the burden of proof cast upon the appellant? I need only refer to a decision of the High Court which binds this board. It is *A.B.C.* v. *The Comptroller of Income Tax, Singapore.*[1] The relevant portion is at page 166. It deals with onus of proof and quantum of proof. This is what Buttrose J. said: —

"Section 10 of the Ordinance declares the liability. It provides that income tax shall be payable upon the income of any person ... in respect of all sources specified in the section. It determines what persons in respect of what property are liable. The assessment merely quantifies the exact sum due. The notice of assessment imposes the liability.

The comptroller is, in my view, perfectly entitled under the Ordinance to say 'I determine your chargeable income at $x and assess your liability to tax at $y' and nothing more.

It was argued further that such a construction would place an oppressive and intolerable burden on the taxpayer. By section 80(3) of the Ordinance the onus of proving that the assessment is excessive is placed on the appellant taxpayer. The principle involved was enunciated by Ag. C.J. Isaacs of the Australian High Court in *Federal Commissioner of Taxation* v. *Clarke* [(1927) 40 C.L.R. 246] at page 251 as follows: 'The justice of that burden cannot be disputed. From the nature of the tax, the commissioner has, as a rule no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to the circumstances.' If the taxpayer fails to discharge it because he has conveniently lost his memory or his books or failed to keep proper books he must take the consequences. The onus on the appellant here is not only to show that the assessment is wrong but what must be done to put it right. The taxpayer appellant does not rebut the presumption merely by showing that there is an error in the assessment and thereby creating a blank — he must go further as was indicated in *Trautwein* v. *Federal Commissioner of Taxation* [(1936) 56 C.L.R. 63, 87; 4 A.T.D. 48, 62 and 63] and show either that there ought to be a blank — a complete omission of the item in question, or that something else should be substituted for that item.

To discharge the burden the appellant taxpayer must necessarily exclude all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment. The appellant here is not entitled, in my view to the particulars as to the source or sources from which the comptroller alleges that the appellant derived the amounts in question set out in the notices of assessment. The comptroller may no doubt assign a source if he wishes but there is nothing in the Ordinance which can compel him to do so."

A number of principles can be deduced from the above portions of the judgment. So far as they apply to this appeal, first, the comptroller has in the appeal before us assigned sources of income of the appellant on which he has raised the assessments. It is not, as in the case cited, that no source has been assigned. If the appellant is to discharge the burden, it has got to show that it did not derive from the par-

ticular sources any taxable income. Secondly, it must show that there ought to be a blank, a complete omission of the items in question or that something else should be substituted for them. It is in this light that I propose to analyse the evidence.

A.W.1, the managing director, has given evidence that the sources of income of the appellant were: —

(a) sales from retail departments of the store;

(b) sub-lettings made by the appellant on leases it enjoyed;

(c) wholesale of textiles, etc., and

(d) interest from firms in which either it was a partner or proprietor.

There is no dispute between the appellant and the comptroller on this aspect of the appeal. I, therefore, need not deal in detail with these sources of income of the appellant.

The principal contention for the appellant is that the comptroller should not have excluded a particular source, namely, profits or otherwise derived by the appellant from its trading activities and let me specify it — trading activities carried on by the appellant at No. 30-1 Raffles Place. It is submitted that if that source had been included in the assessments raised by the comptroller, then there were certain capital allowances that will have to be made in favour of the appellant which would have the effect of off-setting the income derived by the appellant from the other sources on which the comptroller has assessed the appellant. That, I think, is in crux, the case for the appellant.

The comptroller's contention or answer is simply this:

"The appellant has not submitted accounts. I am, therefore, not in a position to consider whether there is any chargeable income on the particular source. I have, therefore, for the moment, excluded that source. I am prepared if properly audited accounts are given to me, to consider that source, and, having considered the source to make adjustments as regards the chargeable income of the appellant as a whole."

I should now deal with the matter of capital allowances. It is in evidence that in the year 1962, there was a sum of $31,005 available to be carried forward for the year ending 31st of December 1962 and, this sum relates to the source of the appellant from the particular trading activity that had been excluded by the comptroller. But the evidence is that the comptroller has not yet raised the assessment, as a whole, against the appellant for the year of assessment 1963. It is not a subject matter of appeal before us. The board is only concerned with the years of assessment 1964 to 1968. There is also evidence that the company ceased this particular trading activity on 31st of January 1965. Therefore, assuming that there are capital allowances available to be carried forward for the years subsequent to 1962, they would cease to be available in favour of the appellant on 31st of January 1965. So, any capital allowances that may or may not be available in favour of the appellant cannot affect the tax liability of the appellant for the years subsequent to 31st of January 1965.

Now, reverting to the evidence, I will deal further with the evidence of A.W.1. We have had the opportunity to see him give evidence in the witness box and I have, I think, with reasonable accuracy recorded his evidence. I do not propose to go through the lot today. Merely to illustrate the conclusion we have arrived at, I will mention a few pieces of his evidence. First, there is his evidence in examination-in-chief that one of the reasons as to why he did not take steps to submit properly audited accounts to the comptroller was that the comptroller was aware of the difficulties the appellant had incurred in the latter part of 1963 and early 1964, the strike and the fire referred to, and the comptroller was good enough to give him time to prepare his accounts. This, we now know, is not true. I have referred at length to the facts and they speak for themselves. In this context, there is his evidence that if he had paid serious attention to prepare the accounts, they could have been done in the years 1964 and 1965. But we now know that this was not done till very recent times. Secondly, the accounts of the appellant were kept by Mr. Hai, a book-keeper. According to A.W.1, Mr. Hai was at all times available to the auditors, Messrs. Cooper Brothers, to give explanations, etc. on the accounts. In fact, A.W.1 relied heavily, as we understand his evidence, on Mr. Hai. The appeal was set down for hearing some time ago. A.W.1, knew, or ought to have known that Mr. Hai was a very important witness, at this hearing, to give evidence in his favour. Yet A.W.1 says he allowed Mr. Hai to leave the country on 31st of March 1970 for India, a week before the hearing of the appeal. It is of some significance to note that A.W.1 says, and, the question was put by the board:

Q: "You know that this Mr. Hai is a very material witness in this case?"

A: "I would not know that. It is only as a result of income tax view-point put yesterday morning that I came to know that Mr. Hai's presence would seem necessary."

If A.W.1 had stopped at this point, perhaps, that would have been an explanation. But then the very next words he says are: "I used my very best endeavours requesting him to defer his departure but because of his ill health which I also manifestly saw, he persisted in going". That to our minds is an unsatisfactory explanation as to why Mr. Hai was not available to give evidence. Also, we do not accept A.W.1's evidence that he only knew of the importance of Mr. Hai after having heard, at the hearing, the stand taken by the comptroller. It is, I think, a rule of commonsense that if a party has a witness whom he knows or ought to know would give evidence in his favour and that party elects not to call that witness, then it is a reasonable inference that had he been called his evidence would be adverse to the party calling. I will leave it at that.

Thirdly, just before a luncheon adjournment, A.W.1 gave evidence that A.3 represents the retail stock and does not include the wholesale stock. We watched him go through the books of A.3 carefully before he gave that evidence. He was sure.

"Q: Where is the stock taken of your wholesale trade?

A: There is a stock register we maintained of our wholesale stock. The stock taken at the end of 1963 would be shown in the stock register."

After the adjournment, however, he chose to, if I may use a common expression, 'do a somersault'. His evidence is contrary to what he had stated before the adjournment. I asked him whether during the adjournment he had taken advantage of it and looked at the books again. His answer was: "I did not during the luncheon adjournment inspect A.3." It seems to us, if he had frankly said that during the adjournment he had time to reconsider the matter and examine the books, and, he now can say that the wholesale stock is also included in the books, A.3, that would be a proper explanation. But he said that he had not inspected the books at all. It was then put to him in cross-examination, by counsel for the comptroller, that he had in fact inspected the books during the adjournment. He admitted that he did see it but qualified it by saying that he only looked at one book. I will not labour on this point. I think I have sufficiently shown why we cannot accept his evidence.

As regards the evidence of A.W.2, Mr. V. P. Kumaran, I will be brief. He listened through the proceedings. During the relevant years, he had been the secretary of the appellant. He was the accountant in charge of preparing the accounts. His evidence must, naturally enough, be based, in favour of the appellant. On the other hand, we have the evidence of A.W.3, Mr. McComarck, who had been called by the appellant. He is an independent witness. He has no interest in these proceedings. Suffice it to say, his evidence is diametrically opposite, as regards the accounts, to that of Mr. Kumaran. We are asked to choose between competing witnesses for the same side. We prefer to accept the evidence of Mr. McComarck and we reject, so far as it is relevant, the evidence of Mr. Kumaran.

I now turn to the very material document, the audited accounts and report for the year ending 31st of December 1963, A.2, that has been tendered by the appellant. In the course of the hearing I had said, that we, looking at A.2 as laymen, thought that it was adverse to the appellant's case. That opinion which we shared has been confirmed by the evidence of Mr. McComarck. He said that his report is that the balance sheet and profit and loss account do not give a true and fair view of the state of affairs of the company as at 31st of December 1963. What is more he cannot say that the directors' report which is at page 1 of A.2, gives a true and fair view of the matters dealt with therein for the said year. To reinforce the point, the comptroller has called R.W.1, the Professor of Accountancy in the University of Singapore. He does not say very much but he says that A.2 is not worth scrutiny. That is the effect of his evidence. Can it, therefore, be said that the comptroller is being unreasonable in refusing to accept the audited accounts of the appellant when the auditors themselves cannot say that the accounts are correct? A similar report, not so black, had been submitted by the auditors of the appellant for the year ending 31st of December 1962. We are not concerned with it except as to the contention of the appellant that there are certain capital allowances that should be allowed. The comptroller says he is not prepared to accept that too. We rule that A.2 is not acceptable to us.

On this point, I need only make one other observation. It has been submitted by Mr. Sat Pal Khattar that audited accounts have not been submitted to the board for the years of assessments 1965, 1966, 1967 and 1968. In the absence of properly audited accounts, we can come to no other conclusion except that, so far as those years are concerned, the appeal must be dismissed.

Reverting to the year ending 31st of December 1963, we are left to decide whether any capital allowances should be considered. A.2 not being acceptable to us, no capital allowance can be made in favour of the appellant. In any event, the comptroller has not yet assessed the appellant on the particular source which gives rise to the question of capital allowances. Therefore, for the year of assessment 1964, too, the appeal must be dismissed.

There is evidence before the board that the comptroller, in raising his assessments for the years of assessment 1966 to 1968, has given a deduction for property tax which the comptroller thought the appellant had paid in respect of No. 30 Raffles Place. Since then, he has found, and, it is admitted for the appellant, that the appellant did not pay the property tax. We have no alternative but to direct the comptroller to amend the assessments for those years that deduction had been made in favour of the appellant.

Wee Sip Chee and **Oon Beng Soon** (members) concurred.

[The taxpayer appealed to the High Court. *Amarjit Singh Verick* appeared for the appellant and *Cheah Cheng Hoc* for the comptroller. On June 22, 1972 the following judgment was delivered:]

Kulasekaram J.: The appellant taxpayer is a private limited company. It appeals from the decision of the Income Tax Board of Review dismissing its appeal to the said board from the assessments raised by the Comptroller of Income Tax for the amount of Income Tax due from it in respect of the years of assessments 1964 to 1968.

It is common ground that the appellant company in spite of repeated requests from the Comptroller of Income Tax had failed to furnish income tax returns for the five years, 1964 to 1968. The Comptroller of Income Tax had therefore proceeded to raise these five assessments for the years 1964 to 1968 under the provisions of section 72 subsection (3) of the Income Tax Ordinance.

In the present appeal the appellant company in its petition of appeal has set out no less than nine grounds of appeal but the only ground of any substance and on which I decided this appeal is ground number 3. The remaining eight grounds are not of any substance and I would not have interfered with the decision of the Board of Review on any of those eight grounds. Let me now deal with ground No. 3 of the petition of appeal here which reads: —

"III. The Committee of the Income Tax Board of Review erred in rejecting the contention of the appellant company that the respondent had failed to exercise the best of his judgment under section 72(3) of the Income Tax Ordinance (Chapter 166) in making the assessments the subject of this appeal."

Since the Comptroller of Income Tax in raising these five assessments in question acted under the provisions of section 72 subsection (3) it would be convenient here to set out that subsection: —

"Where a person has not delivered a return and the comptroller is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, determine the amount of the chargeable income of such person and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

The Comptroller of Income Tax when he acts under section 72(3) must use his best judgment, or in other words do as best as he can and ascertain the chargeable income of the taxpayer from all known sources the taxpayer had giving rise to income that is chargeable with tax and then assess the tax that is payable by the taxpayer on that chargeable income. He must take into consideration all known relevant information that he has in making his judgment. As in these cases he is not armed with the proper income tax returns from the taxpayer for the relevant period he will therefore have to rely on other available information which may well be very scanty in a great many of such cases. In those circumstances the ascertainment of the chargeable income may well have to be largely guess work on the part of the Comptroller of Income Tax.

Having used his best judgment the Comptroller of Income Tax may just say "I determine your chargeable income to be $ X and the tax payable by you on that income to be $ Y.". When the Comptroller of Income Tax acts under the provisions of section 72(3) such an assessment would be perfectly in order. He is not required under the Ordinance to give any details of how he arrived at this amount of chargeable income. He is not required to set out the sources from which this income was derived and what amount of assessable income was received from each of the sources. The onus is on the taxpayer to show that the chargeable income as set out in the assessment of the Comptroller of Income Tax is wrong and that he did not receive that amount of chargeable income from all his sources of income. The taxpayer has not merely to show that the amount of chargeable income in the assessment of the Comptroller of Income Tax is wrong but he must go further and show also by what amount it is wrong and what the correct chargeable income from all his sources should be. Unless the taxpayer succeeds in discharging this onus the original assessment of the Comptroller of Income Tax will remain in force.

The Comptroller of Income Tax may however when he makes an assessment set out how he arrived at this chargeable income, the sources which he considered, and the assessable income or loss that arose from each of these sources in arriving at the final amount of chargeable income.

In the present case when the Comptroller of Income Tax acting under section 72(3) of the Ordinance raised the five assessments in question for the years of assessment 1964 to 1968 in respect of the income of the appellant taxpayer he subsequently, by a letter dated 31st October 1968 (A5), informed the taxpayer the basis on which he had raised the five assessments in question.

It is also not in dispute that the Comptroller of Income Tax when he raised these five assessments knew from the previous returns submitted by the taxpayer for earlier years and from other information available to him that the taxpayer during the material period had the following sources of income chargeable with tax, *viz:*

(a) retail trade as a departmental store carried on by the appellant taxpayer;

(b) wholesale trade of textiles, etc. carried on by the appellant taxpayer;

(c) sub-lettings made by the appellant taxpayer on leases which it enjoyed;

(d) interests on loans to firms in which the appellant taxpayer was a partner or proprietor.

It is clear from the letter of 31st October 1968 where the Comptroller of Income Tax set out the basis of his five assessments that he only took into consideration sources (c) and (d). There is no reference there to the income or losses arising from sources (a) and (b). It is also in evidence that the taxpayer ceased his retail trading activities after 31st January 1965 and therefore source (a) need not be taken into consideration for the years of assessment 1967 and 1968. The taxpayer however carried on his wholesale trading activities throughout the whole of the relevant five year period.

Counsel for the Comptroller of Income Tax submitted before me that the effect of there being no mention of these two sources (a) and (b) in the letter setting out the basis on which these five assessments were arrived at was that the Comptroller of Income Tax in effect assessed that these sources produced no income nor loss. In other words these two sources were assessed by the Comptroller of Income Tax as having produced 'nil' income. Therefore he submitted that the fact that no mention was made of these two sources does not mean that the Comptroller of Income Tax has not assessed the taxpayer on these two sources and so the five assessments in question were in order.

If in fact that were the correct position here, then I would have accepted this submission and found the five assessments in order. I am however unable to accept this submission of the counsel for the Comptroller of Income Tax because from the evidence before the Income Tax Board of Review of Mr. Yee Fook Hong (R.W.2), the Senior Assessment Officer, who raised these five assessments on behalf of the Comptroller of Income Tax, it is quite clear that the Comptroller of Income Tax did not take into consideration these two sources of income.

Let me quote the relevant portion of Mr. Yee Fook Hong's evidence.

"A.5 was raised on section 72(3) of the Ordinance.

Q. How did you exercise your judgment in raising an assessment in A.5?

A. In the absence of audited accounts for the years ended 31.12.63 to 31.12.67, these assessments were raised on specific known sources of income available on informato the comptroller.

(The Board:

Q. Did the company furnish to the comptroller returns for these relevant years?

A. No.

Q. Did the comptroller send to the company returns under section 65 of the Ordinance?

A. Yes.)

In the absence of properly audited accounts, the comptroller was unable to determine the profits from trading chargeable for the relevant years.

Q. In raising your computations for the years of assessment 1964 to 1968 you disregarded all the trading activities of the company?

A. In these assessments the comptroller has not brought in the source from trading.

(The Board:

Q. Why?

A. Because the comptroller was not able to ascertain the profits from trading.)"

It is abundantly clear from the above that the Comptroller of Income Tax has not assessed the taxpayer on his trading activities namely the sources (a) and (b) because the taxpayer had not submitted audited accounts of its trading activities and therefore he says he was unable to assess it on these sources of income.

Now when the Comptroller of Income Tax raises these assessments under section 72(3) of the Ordinance he must use his best judgment and assess the chargeable income of the taxpayer taking into consideration *all* the known sources of income chargeable with tax. In this case it would appear the trading activities of the taxpayer were substantial in character and formed a very significant part of the activities of the taxpayer. If these sources produced any losses then that would offset the profits made from the other sources and reduce the taxpayer's liability to that extent.

Even though the taxpayer had not submitted proper audited accounts it is the duty of the Comptroller of Income Tax to assess him on these known sources of income as best as he can, be it even sheer guess work only, on all the information available to him, however scanty they may be. He is not permitted to postpone making assessments from these sources until the taxpayer has submitted his audited accounts. If he does that, and indeed that is what he has done when he raised these five assessments, then those assessments would be null and void *ab initio* as he has not used his best judgment in arriving at these assessments.

To my mind when the Comptroller of Income Tax acts under section 72(3) of the Ordinance he is not permitted to make a tentative assessment taking into consideration only some of the known sources of income of the taxpayer and leaving out others in making his assessment. He must assess the taxpayer on all the known sources of income of the taxpayer. The assessment that he makes must be a complete and final one. Of course if after he has made the assessment he comes to know of some other source of income of the taxpayer or some other information comes to his knowledge which was not known to him at the time he raised the assessment then there is clear provision in the Ordinance for the Comptroller of Income Tax to raise fresh or amended assessments. Such is not the case here. For these reasons I allowed the appeal and annulled the five assessments in question. The Comptroller of Income Tax is at liberty to raise fresh assessments in respect of the five years in question within the period of limitation. I also ordered that the appellant should have the costs of this appeal.

[From this decision the comptroller appealed to the Court of Appeal. The judgment of the court was read by:]

Tan Ah Tah J.: At the conclusion of the hearing we allowed the appeal indicating that we would give our reasons at a later date. We now proceed to do so.

The facts relevant to this appeal which concerns the assessment of income tax may be briefly stated as follows. The taxpayer is a private limited company (hereinafter referred to as "the company"). In spite of numerous requests made by the Comptroller of Income Tax (hereinafter referred to as "the Comptroller") the company failed to furnish any income tax returns for the five years of assessment 1964 to 1968. The comptroller thereupon raised five assessments for the years in question under the provisions of section 72(3) of the Income Tax Ordinance which read as follows: —

"(3) Where a person has not delivered a return and the comptroller is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, determine the amount of the chargeable income of such person and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

The company appealed to the Board of Review which, after hearing evidence given on behalf of both parties and the submissions of counsel, dismissed the appeal. The next step taken by the company was to appeal to the High Court, which allowed the appeal and annulled the five assessments, giving the comptroller liberty to raise fresh assessments in respect of the five years in question. It is against this decision of the High Court that the comptroller lodged this appeal.

It was not in dispute that when the comptroller raised the five assessments he knew from previous returns submitted by the company for earlier years and from other information available to him that the company during the relevant period had the following sources of income chargeable with tax: —

(a) retail trade as a departmental store carried on by the company.

(b) wholesale trade in textiles, etc. carried on by the company.

(c) sub-lettings made by the company on leases which it enjoyed.

(d) interest on loans to firms in which the company was a partner or proprietor.

During the hearing before the Board of Review an adjournment was granted to enable the company to submit its accounts. After some delay, the company produced accounts relating to the year of assessment 1964. The Board of Review examined these accounts and after due consideration reached the conclusion that even in the light of these accounts the comptroller's judgment had been properly exercised. This aspect of the case was not dealt with by the learned judge.

In allowing the appeal the learned judge took into consideration the evidence of Mr. Yee Fook Hong, the Senior Assessment Officer, who stated during the proceedings before the Board of Review that in raising the assessments the comptroller had not brought in the sources from the trading activities of the company because the comptroller was not able to ascertain the profits derived from such trading activities. Having considered this evidence, the learned judge came to the conclusion that the comptroller had postponed the raising of assessments based on the sources relating to trading activities until the company had submitted its audited accounts. This is clear from the following passage in his judgment: —

"Even though the taxpayer had not submitted proper audited accounts it is the duty of the Comptroller of Income Tax to assess him on these known sources of income as best as he can, be it even sheer guess work only, on all the information available to him, however scanty they may be. He is not permitted to postpone making assessments from these sources until the taxpayer has submitted his audited accounts. If he does that, and indeed that is what he has done when he raised these five assessment, then those assessments would be null and void *ab initio* as he has not used his best judgement in arriving at these assessments."

In our opinion, the learned judge was in error when he reached the conclusion set out in this passage. Since no audited accounts for the relevant years had been furnished by the company to the comptroller, the latter was not in a position to determine whether there had been a profit or loss in the trading activities of the company and he therefore ignored them, as he was entitled to do, and raised assessments based on the known income of the company.

It should be added that in order to succeed in its appeal to the High Court it was not enough for the company to show that the comptroller had ignored certain sources of income. There was the further onus on the company to show in what way the comptroller's assessments were erroneous, for example, by proving a loss or losses incurred by it in respect of the sources of income which had been ignored by the comptroller. We agree with the following passage from the judgment of Buttrose J. in *A.B.C.* v. *The Comptroller of Tax*[1] at page 166: —

"It is no doubt a truism to say that you cannot have income without a source but on the construction of the Ordinance as a whole I am unable to find anything which requires the comptroller or imposes upon him a duty to specify or give particulars of the sources of a taxpayer's income before a legal liability to tax is disclosed. Section 10 of the Ordinance declares the liability. It provides that income tax shall be payable upon the income of any person.... in respect of all sources specified in the section. It determines what persons in respect of what property are liable. The assessment merely quantifies the exact sum due. The notice of assessment imposes the liability.

The comptroller is, in my view, perfectly entitled under the Ordinance to say 'I determine your chargeable income at $x and assess your liability to tax at $y' and nothing more.

It was argued further that such a construction would place an oppressive and intolerable burden on the taxpayer. By section 80(3) of the Ordinance the onus of proving that the assessment is excessive is placed on the appellant taxpayer. The principle involved was enunciated by Ag. C.J. Isaacs of the Australian High Court in *Federal Commissioner of Taxation* v. *Clarke* (1927) 40 C.L.R. 246 at p. 251 as follows: —

'The justice of that burden cannot be disputed. From the nature of the tax, the commissioner has, as a rule no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to the circumstances.'

If the taxpayer fails to discharge it because he has conveniently lost his memory or his books or failed to keep proper books he must take the consequences. The onus on the appellant here is not only to show that the assessment is wrong but what must be done to put it right. The taxpayer appellant does not rebut the presumption merely by showing that there is an error in the assessment and thereby creating a blank — he must go further as was indicated in *Trautwein* v. *Federal Commissioner of Taxation* (1936) 56 C.L.R. 63 and show either that there ought to be a blank — a complete omission of the item in question, or that something else should be substituted for that item.

To discharge the burden the appellant taxpayer must necessarily exclude all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment.

The appellant here is not entitled, in my view, to the particulars as to the source or sources from which the comptroller alleges that the appellant derived the amounts in question set out in the notice of assessment. The comptroller may no doubt assign a source if he wishes but there is nothing in the Ordinance which can compel him to do so.

As was pointed out by Kitto J. in *George* v. *Federal Commissioner of Taxation* (1952) 86 C.L.R. 183 if the commissioner attempts to prove derivation from a particular source and fails, he is nonetheless entitled under the Act (The Income Assessment Act 1936-1947, of Australia) to point to another source, or, without bothering about source at all to stand upon his assessment and submit that the presumption in his favour has not been displaced.

I think that is precisely the position under the Ordinance."

In our judgment, the company failed to discharge the onus which lay upon it. We accordingly allowed the appeal and made an order that the decision of the Board of Review should stand. We also made an order that the company should pay the costs of this appeal and of the appeal to the High Court.

Appeal dismissed.

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